LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005-5901
(202) 434-5000
FAX (202) 434-5029

June 15, 2010

The Honorable Richard C. Tallman, Chair
Judicial Conference Advisory Committee
On the Rules of Criminal Procedure
Attn: Rules Committee Support Office
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20054

Re: Rule 16 of the Federal Rules of Criminal Procedure

Judge Tallman:

We write on behalf of the partners at our firm who represent federal criminal defendants. We support amending Rule 16 of the Federal Rules of Criminal Procedure to require the disclosure of all exculpatory information to the defense well in advance of trial. We strongly endorse the letter of Judge Emmet G. Sullivan dated April 28, 2009 recommending an amendment to Rule 16. We further endorse the specific recommendations of the American College of Trial Lawyers.[1]

Our firm represents criminal defendants in federal courts around the country, and a number of our lawyers received your recent invitation to participate in a survey regarding criminal discovery practices in federal district courts. We appreciate greatly your solicitation of input from defense lawyers, and we write to supplement that survey.

[1] *See* Proposed Codification of the Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16, 41 American Criminal Law. Review. 93 (Winter 2004); http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62

Lessons from *United States v. Stevens*. Our firm was defense counsel in *United States v. Stevens*.[2] The government's failure to provide exculpatory information to the defense in that case is well-known and is the subject of two pending investigations. We expect the full measure of the government's discovery failures to emerge in due course from those investigations. For purposes of the debate over whether to amend Rule 16 to provide that all exculpatory information be provided to the defense, there are two critical points to make.

First, the government argued in the *Stevens* case that its repeated failures to turn over information helpful to the defense were not actual *Brady* failures because the withheld information was "not material." This illustrates the problem with limiting the required disclosure of information to that which an appellate court would consider "material" in hindsight. Many prosecutors may be unlikely in the heat of battle to turn over information that they know will hurt their case so long as they can later argue "materiality" to justify their decision. Professor Locke E. Bowman of Northwestern Law School, an expert on wrongful convictions, stated at a recent panel discussion on criminal discovery at the Seventh Circuit Judicial Conference that we need a rule that makes it "impossible to rationalize non-disclosure." Eliminating the materiality limitation would make it impossible to rationalize non-disclosure. It should also lead to less pre-trial litigation over whether information is or is not "material."

The second critical point from the *Stevens* case as it relates to the debate over Rule 16 is that Judge Sullivan prevented the wrongful conviction of Senator Stevens by ordering that *all exculpatory information* be provided to the defense under Judge Paul L. Friedman's opinion in *United States v. Safavian*.[3] Judge Sullivan's frustrations with the government's failure to comply with his initial order led him to order that all grand jury transcripts and government interview memoranda be turned over to the defense. This led to revelations that the government had repeatedly made misrepresentations to the Court and eventually led to a whistleblower complaint from an FBI Agent, prosecutors being held in contempt, and the appointment of a new prosecution team. The new prosecution team uncovered information which was "material" under any conceivable definition of materiality. *It was Judge Sullivan's directive that all exculpatory information be provided to the defense that set off a chain of events that led to the production of concealed information that was undeniably "material."*

Experience in Other Cases. Our experience in other cases is difficult to describe, because from a defense lawyer's perspective, government discovery emerges from a black box. More often than not, the government has merely told us that it is aware of its obligations and will abide by them. There is no transparency in the process, and we simply do not know what ground rules the government has employed in deciding what to produce and what to withhold. We can say this: *when we have used logic and instinct to push for additional information, we have often uncovered information that was inarguably exculpatory but was withheld from production despite the government's representations to the defense that it had already met its obligations.*

---

[2] Cr. No. 08-231 (D.D.C.).

[3] 233 F.R.D. 12 (D.D.C. 2005).

Because government discovery happens behind closed doors with no transparency, we cannot truly know (nor can the Department of Justice truly know in the absence of a complete review of its files) how many *Brady* violations we have experienced.[4] But it is reasonable to infer that beyond those *Brady* violations of which we have learned, there are additional violations about which we may never know. Chief Judge Mark L. Wolf of the District of Massachusetts has written this about *Brady* information: "Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light."[5] Regardless of how frequently it has occurred, we know from our experience and other recent federal cases that it has happened far too often.[6]

We also know from the invention and use of DNA testing and the work of organizations such as the Innocence Project that scores of citizens have been wrongfully convicted in this country – many of whom were on death row at the time of their exonerations. A review of the Innocence Project website reveals that the failure of the prosecution to disclose exculpatory information contributed to many of these wrongful convictions.[7]

While no rule change can guaranty protection from dishonest prosecutors, an unambiguous rule requiring the disclosure of exculpatory information in time for the defense to use it effectively would make it less likely that innocent citizens will be convicted in the future.

Privacy and Witness Safety. We are aware that concerns have been raised about privacy and witness safety. These issues do not affect the majority of cases, and we do not believe that those cases that do present issues of privacy and witness safety should stand in the way of basic fairness in all cases. When these issues do arise, they can be addressed through protective orders, which are entered every day in civil cases.[8]

---

[4] Even a complete review of government files may not resolve the matter, because the government rarely records its interviews of witnesses. We have experienced a number of cases where FBI agents have failed even to prepare a memorandum memorializing witness interviews notwithstanding an FBI regulation purportedly requiring them to do so.

[5] *United States v. Jones*, 620 F.Supp. 2d 163, 172 (D. Mass. 2009).

[6] In 2009 alone, there were at least four additional well-publicized federal cases beyond *Stevens* marred by major *Brady* violations. *See United States v. Jones, supra*; *United States v. Shaygan*, 661 F.Supp. 2d 1289 (S.D. Fla. 2009); *United States v. W.R. Grace*, Case No. 9:05-cr-00007-DWM (D. Mont.) Doc. 1150 (4/28/09); *United States v. Torres-Ramos*, Case No. 2:06-cr-00656-SVW (C.D.Cal) Doc. 997 (9/18/09).

[7] *See* http://www.innocenceproject.org/understand/Government-Misconduct.php. Again, it is reasonable to assume that there are many more instances of withheld evidence than reflected on the Innocence Project website, because biological evidence susceptible to DNA testing is not available in most cases, including most federal cases.

[8] The Classified Information Procedures Act dictates how information affecting national security should be handled.

New Department of Justice Guidance. We are also aware that the Department of Justice has recently undertaken a major effort to promulgate guidance to its employees regarding discovery in criminal cases. We appreciate this effort. This is a step forward and is consistent with the leadership we have seen from this Attorney General and others in this Department of Justice.

That said, the Guidance does not go far enough. It expressly provides that it "is not intended to have the force of law or to create or confer any rights, privileges or benefits." Moreover, the new Guidance provides that the policy of providing broad and early discovery may be overridden by "countervailing concerns" such as "strategic considerations that enhance the likelihood of achieving a just result in a particular case." What are defense lawyers or judges to do when next confronted with failures to provide exculpatory evidence to the defense? The Department's Guidance does not provide any rights at all. And assurances from current leadership of the Department that they will make sure that the Department's prosecutors do the right thing may be small comfort when the Department's current leaders are no longer in charge.[9]

Finally, the Department's Guidance ignores Formal Opinion 09-454 of the American Bar Association Standing Committee on Ethics and Professional Responsibility (July 8, 2009), which provides that all exculpatory information needs to be disclosed to the defense under Rule 3.8(d) of the ABA Model Rules of Professional Conduct. Rule 3.8(d) has been adopted in most jurisdictions, and the Committee's opinion reflects the view of the Bar that exculpatory information needs to be provided to the defense without a "materiality" limitation.

* * * * *

In the months since the *Stevens* case, people from all walks of life have told us that they have deep concerns that our system of justice is not fair. Professor James E. Coleman of the Duke University School of Law and Director of Duke's Wrongful Conviction Program, wrote this after the Attorney General moved to dismiss the *Stevens* case:

---

[9] By way of another example of a problem with the Department's Guidance, the Guidance expressly endorses the use of summary letters as a substitute for providing source documents in certain situations. We received a letter purporting to summarize *Brady* information in the *Stevens* case that was chock-full of falsehoods. Judge Sullivan found that "the use of summaries is an opportunity for mischief and mistake. . . ." *See* April 7, 2009 Hearing Transcript at 9. Moreover, it is impractical to use a summary from a prosecutor to impeach a witness, because that likely makes the prosecutor a witness.

> Many of the people who will praise Mr. Holder for dropping the charges against Mr. Stevens will not care that the same kind of misconduct routinely taints the trials of those who are not rich, or famous, or well-connected, or well-regarded. Nor will they likely step back and learn from what happened to Mr. Stevens.

We must learn from what happened to Senator Stevens. Our system of criminal justice must be fair. And it must be perceived to be fair. Amending Rule 16 to provide that all exculpatory evidence be provided to the defense – with appropriate accommodations for privacy, witness safety and national security – would go a long way to restore our confidence and the public's confidence in our system of criminal justice.

We would be happy to provide further information and to answer any questions you may have.

Respectfully,

Brendan V. Sullivan, Jr.

Robert M. Cary

cc: Honorable Mark L. Wolf
Chief Judge, U.S. District Court for the District of Massachusetts
Honorable Paul L. Friedman
Senior Judge, U.S. District Court for the District of Columbia
Honorable Emmet G. Sullivan
Judge, U.S. District Court for the District of Columbia
Professor James E. Coleman, Jr.
Duke University School of Law
Professor Locke E. Bowman
Northwestern University School of Law